STRAITS SETTLEMENTS.

[ORIGINAL CIVIL JURISDICTION]

SPROULE, Ag. C.J.

July 24, 1928.

RE FATIMAH BINTE MOHAMED BIN ALI AL TWAY, DECEASED.

[SINGAPORE PROBATE No. 213 of 1927]

Will—Codicil—Arabic document purporting to be a "nasr"—testamentary document or not?

An Arabic document purporting to effect a gift *inter vivos* of the kind known as a "*nasr*" may nevertheless be a valid testamentary document.

Trial of issue.

A Probate Petition was filed by the attorney of the executor of Fatimah binte Mohamed bin Ali Al Tway, an Arab Mohamedan widow. Letters of Administration with the said will annexed were duly granted to him as such attorney; but he also brought in and propounded a document as a codicil to the said Will. This Codicil was in the form of an Arabic document known as a "*nasr.*" Accordingly by Order of Court parties were added to the proceedings interested on the one side in upholding the validity of the document as a Codicil, and on the other side in maintaining its invalidity, and representation orders were made accordingly.

An issue was directed to be tried between them "Whether the Codicil now propounded and annexed to the Will of the deceased is a valid codicil or not?"

Da Silva for the Plaintiff on the issue (a specific legatee under the Codicil), referred to the following cases, *Cock* v. *Cooke*, L.R. 1 P. & D. 241, *re Robinson*, L.R. 1 P. & D. 384, *Robertson* v. *Smith*, L.R. 2 P. & D. 43. *Attorney General* v. *Jones*, 3 Price 368. The document though in form a gift *inter vivos* could only take effect on death and there was an evident testamentary intention.

John Laycock for the Defendant on the issue (a residuary legatee under the Will). A "*nasr*" is an irrevocable gift *inter vivos* made in fulfilment of a vow. By gift *inter vivos* a Mohamedan can by Mohamedan Law or religion (having the force of law in Arabia) dispose of the whole of his property but by Will he can only dispose of one third of the same. The use of the word "*nasr*" as opposed to "*Wasihat*" (will) rebuts any implication of testamentary intention. The document not being stated to be a Will and being stated to be a "*nasr*" the onus of proving testamentary intention is on the plaintiff. If irrevocable, the document could not be a will, *re Robinson (supra)*. Baillie's Mohamedan Law, 2nd Edn., pp. 261, 566 & 602. *Thorold* v. *Thorold*, 1 Phillimore 1. Williams on Executors. Evidence was called to prove the meaning and effect of a "*nasr.*"

SPROULE, AG. C.J.—Shaika Fatimah on 29th April, 1921, executed a Will and Testament conforming to the provisions of our Wills Ordinance No. 3.

Five years later she appended to this document an instrument which, for the purpose of this judgment I freely translated as follows, omitting full family names and descriptions:—

> Verily Shaika Fatimah.....gives in *Nasr* to Syed Salim the house in her name No. 16 Robinson Road at Singapore and the house at Shibam named "Darawadanah" on the condition that the property shall become the property of the donee three days prior to her death if she dies through illness or one day prior to her death in the event of her dying suddenly. She understands that a *Nasr* deprives her of her property. Made of her own accord whilst of sound mind and enjoying freedom of action and acknowledging the *Nasr*.
>
> (Signed) Fatimah binte Thah bin Ali Al Tway.

Her acknowledgment at her request is written and witnessed by (signed) Abubakar bin Mohamed Al Tway.

Witnessed by (2 persons who also witnessed the Will).

The above *Nasr* is correct. Declared and written by the Kathick of Shibam (signed and sealed by him).

His signature (witnessed by Hussain Acmathar).

Let all Praise be to God.

Probate has been taken out by the Executors of the Will and an Order has been made by this Court that Sadiah binte Abdullah a residuary legatee should represent all parties except the *Nasr* donee, Syed Sallim Almathar. An Issue was ordered to be tried, with these two as protagonists, whether the above addition to the Will is a good Codicil and Testamentary instrument or not.

The position appears to be that Testatrix wished to make this gift but she or her relatives and advisers were doubtful whether by so doing she might not exceed the power of disposition of more than one third of her Estate without the consent of her heirs as required by Mohamedan Law. They appear to have hit upon the solution of a fiction *nasr* to save testatrix from all danger of disconforming from the law of Islam.

A *Nasr* is a kind of bargain with the Almighty. A donor vows, conditionally upon recovery from an illness, or the fulfilment of some other dear wish, that he will make a gift, it may be a sacrificial offering, it may be to charity or to some individual for the sake of God. If the heart's wish be granted then the vow in God's name becomes irrevocable by a devout Mohamedan.

In our case there is no evidence of any prayer for the granting of any dear wish, nor of the

vouchsafing of that prayer. There is moreover no evidence of a vow, made in advance, to become binding conditionally upon the granting of any such prayer. There appear to be no more than the legal fiction of a *nasr* intended to ensure a devout Mohamedan from possibly infringing the restriction placed by the Islamic law upon disposition of *wasihat*.

The *nasr*, moveover appears to call for performance of the gift immediately, irrevocably and *inter vivos*. Testatrix therefore is made to confess herself as barred by the fictitious *nasr*. But the further fiction by which she purports to make the gift binding *inter vivos* and irrevocable is worthy of the fabric of legal fiction of our own judge-made system of 150 years ago. The gift is to be deemed to be of effect three days before her death if natural one day before, if sudden.

It is very clear to me that in neither case could the gift actually take effect at all except after and by reason of the donor's death. As for irrevocability that is an incident of *nasr* no doubt, but how far can it be relied upon as an argument in the case of a fictional *nasr* like ours.

Again, the gift is of immoveables in Singapore and our own system of law is *prima facie* applicable.

Again we have never allowed our Wills Ordinance to be subordinated to Islamic law and never recognised any limitation upon the testamentary power completely to dispose. For example we do not recognise, as Islamic law does, an oral Will. And we have applied our own section 13 and held that the Will of a Mohamedan testator is revoked by his subsequent marriage

How then, can it possibly be argued, whether as a matter of construction or not, that a vow to the Almighty (even if in our case, any such vow was ever made) is good and binding consideration for a promise otherwise voluntary.

For these reasons and upon the facts as I see them I hold that Testatrix really intended by this instrument to make a testamentary disposition, that her gift was revocable and that it is expressed and was intended only to take effect conditionally upon and by reason of and subsequent to her own death. I add that even in form it appears sufficiently to conform to our Wills Ordinance.

For these reasons I decide this issue in favour of Syed Sallim, and hold that here was a good Codicil and a good testamentary disposition. I give costs to both parties out of the general residue, to be taxed as between Solicitor and Client, I add that the fear of Testatrix's amateur legal advisers appears to be groundless and that her Will and Codicil together do not after all appear in fact or quantum to transgress the prohibition of Mohamedan Law against disposal by Will of more than one third of a Testator's Estate, although as I have stated the transgression in a case like ours of such a prohibition would not invalidate the Will.

I send the Petition back to the Registrar for formal proof of execution of the Codicil and a grant of Probate accordingly.

Judgment accordingly.

Solicitor for the Plaintiff—*C. H. da Silva.*

Solicitors for the Defendant—*Braddell Bros.*

[APPELLATE CRIMINAL JURISDICTION]

COBBETT, J.

May 22, 1933.

REX v. LIM KENG CHUAN.

[PENANG MAGISTRATE'S APPEAL No. 7 of 1933]

Ordinance No. 133 (Betting) S. 3 (c)—Common Betting House—Game of Skill.

Held, that if a place is used for wagering it may be a "common betting house" even though the wagering is upon the result of a game of skill.

APPEAL from conviction recorded by the District Court at Penang to the Supreme Court, heard before Cobbett, J. The Appellant was convicted on a charge of having used the "New Bazaar," Penang Road, Penang, as a common betting house.

C. D. D. Hogan for Appellant.

Taylor, D.P.P. for Respondent.

The facts and arguments sufficiently appear from the Judgment.

COBBETT, J.—The Accused was charged with the management of a place used as a common betting house under Ordinance 133 (Betting) section 3 (c) and with the management of a place used as a common gaming house under Ordinance 45 (Common Gaming Houses) section 4 (c). He was convicted on the first charge and acquitted on the second.

The facts are not in dispute.

The Accused is the manager of an enclosure in Penang Road which is known as the New Bazaar. There are a number of stalls in the enclosure having boards whereon the game, which gave rise to this prosecution, is played. The enclosure is open to the public, and no entrance fee is charged to go in. The board on which the game is played has a number of holes each of which is numbered. The player purchases a ball or to put it another way he pays an entrance fee as consideration of which he received a ball and writes a number upon a slate. He then rolls the ball, and if the ball falls into a hole having a number which corresponds to the number written on the slate, the player gets a prize in the form of a tin of cigarettes.

It seems that the minimum entrance fee or price of a ball is five cents, but the player can, if he wishes, pay any entrance fee or price for a ball and, if the ball comes to rest in the hole bearing the number nominated, the player receives a tin of cigarettes for each five cents he paid.